MBF FINANCE BHD

v.

TEGUH CONSOLIDATED SDN BHD

COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
RICHARD MALANJUM JCA
HASHIM YUSOFF JCA
[CIVIL APPEAL NO: N-02-481-1997]
29 APRIL 2003

LAND LAW: *Charge - Registration of charge - Charge registered despite express condition in Register of Title prohibiting charging without consent of Ruler in Council - Whether charge invalid as found by trial judge - Whether trial judge right in not ordering execution of a fresh charge - National Land Code, s. 418*

The appellant finance company gave a loan of RM250,000 to one Pembinaan Ikhlas-Jae Sdn Bhd ('the borrower'). The loan was secured by a charge executed by the respondent. It was not disputed that the borrower and the respondent had the same directors and shareholders. The charge was duly registered despite an express condition in the Register of Title that prohibited charging without the prior consent of the Ruler in Council. Subsequently, the borrower defaulted on the loan. The appellant applied for foreclosure proceedings before the Land Administrator but the application failed. The appellant's appeal to the High Court was also dismissed. Hence, this appeal.

Held (dismissing the appeal)
Per Gopal Sri Ram JCA delivering the judgment of the court:

[1] The requirement of the consent of the Ruler in Council was a live condition. So if an order in terms as suggested by the appellant were to be made, such an order would be entirely infructuous if the Ruler in Council were to reject the application to charge. It would be an utterly useless exercise to make such an order. Therefore, the learned judge did not err for not compelling the respondent to execute a fresh charge to obtain the consent of the Ruler in Council. However, an order to remove the charge from the register should be made since it was void. (p 813 e-h)

[2] The appellant was not remediless. It was entitled to obtain judgment on the covenants contained in the annexure to the charge. That document was entirely valid and constituted a contract of loan between the parties. The respondent was obliged to respect its terms and comply with them. Further, there was a lien holders' caveat entered by the appellant. It was therefore open to the appellant to obtain judgment on the covenants and take such appropriate steps necessary to recover the sum due. (p 814 a-b)

*[**Bahasa Malaysia** Translation Of Headnotes*

Syarikat kewangan perayu telah memberi pinjaman sebanyak RM250,000 kepada Pembinaan Ikhlas-Jae Sdn Bhd ('peminjam'). Pinjaman dijamin oleh satu gadaian yang dimeterai oleh responden. Tidak dinafikan bahawa peminjam dan responden mempunyai pemegang-pemegang saham dan ahli lembaga pengarah yang sama. Gadaian telah didaftar dengan sempurnanya walaupun terdapat syarat jelas dalam Daftar Hakmilik melarang gadaian tanpa kebenaran terdahulu Raja Dalam Mesyuarat. Peminjam kemudiannya mungkir dalam membayar balik pinjaman. Perayu memohon kepada Pentadbir Tanah untuk prosiding halang tebus tetapi tidak berjaya. Rayuan perayu ke Mahkamah Tinggi juga ditolak. Maka perayu merayu seterusnya.

Diputuskan (menolak rayuan)

Oleh Gopal Sri Ram HMR menyampaikan penghakiman mahkamah

[1] Syarat yang mengkehendaki kebenaran Raja Dalam Mesyuarat adalah suatu syarat hidup. Oleh itu, jika perintah dalam terma dibuat seperti yang dicadangkan oleh perayu, ianya akan menjadi satu pelanggaran sekiranya Raja Dalam Mesyuarat memutus untuk menolak permohonan gadaian. Membuat perintah sedemikian adalah sesuatu yang langsung tidak bermanfaat. Oleh itu, yang arif hakim tidak silap apabila tidak memaksa responden memeterai satu gadaian baru bagi mendapatkan kebenaran Raja Dalam Mesyuarat. Bagaimanapun, suatu perintah untuk menyingkir gadaian dari daftar perlu dibuat kerana ia adalah batal.

[2] Perayu bukanlah berada dalam keadaan tanpa remedi. Ia berhak untuk mendapat penghakiman berasaskan waad yang terkandung dalam tambahan kepada gadaian. Dokumen tersebut sah sepenuhnya dan merupakan satu perjanjian pinjaman antara pihak-pihak. Responden bertanggungan untuk menghormati terma-terma berkenaan serta mematuhinya. Selain itu, terdapat satu kaveat pemegang lien yang dimasukkan oleh perayu. Oleh itu ianya adalah terbuka kepada perayu untuk mendapatkan penghakiman atas waad-waad tersebut dan mengambil langkah-langkah wajar bagi mendapatkan kembali jumlah yang terhutang.

Case(s) referred to:
M & J Frozen Foods Sdn Bhd v. Siland Sdn Bhd [1994] 2 CLJ 15 SC ***(refd)***
Overseas Union Finance Ltd v. Lim Joo Chong [1971] 2 MLJ 124 ***(refd)***
Subchent Kaur v. Chai Sau Kian [1958] MLJ 32 ***(refd)***
United Malayan Banking Corporation Bhd v. Syarikat Perumahan Luas Sdn Bhd (No 2) [1988] 3 MLJ 352 ***(refd)***

Legislation referred to:
National Land Code, s. 418

For the appellant - SG Lingam (Magdline Gomez); M/s Param Magdline & Assoc
For the respondent - Thanyub Khan (CY Ngeow); M/s CY Ngeow & Assoc

[Appeal from High Court, Seremban; Originating Motion: 25-19-96]

Reported by Usha Thiagarajah

JUDGMENT
(Oral)

Gopal Sri Ram JCA:
This is the judgment of court.

This appeal is directed against the Order of the High Court in Seremban dismissing an appeal brought to it under the provisions of s. 418 of the National Land Code 1965. That section reads as follows:

> 418 (1) Any person or body aggrieved by any decision under this Act of the State Director, the Registrar or any Land Administrator may, at any time within the period of three months beginning with the date on which it was communicated to him, appeal therefrom to the Court.
>
> (2) Any such appeal shall be made in accordance with the provisions of any written law for the time being in force relating to civil procedure; and the Court shall make such order thereon as it considers just.
>
> (3) In this section 'decision' includes any act, omission, refusal, direction or order.

The brief facts relevant to this appeal may be shortly stated.

The appellant is a licensed finance company. It lent RM250,000 to a company known as Pembinaan Ikhlas-Jae Sdn Bhd (hereinafter referred to as the borrower). The loan was secured by a charge executed by the instant respondent. It is common ground and frankly conceded by the appellant and respondent that the borrower and the chargor (ie, respondent) have same directors and shareholders.

The charge in question was duly registered. This fact is a mystery because the registration took place in defiance of the express condition in the Register of Title that contained a prohibition against charging without the prior consent in writing of the Ruler in Council, which consent was never obtained. Indeed, it has not been obtained until today.

In due course, the borrower company defaulted on the loan. The title to the charged land being a Land Office Title, the appellant took out foreclosure proceedings before the Land Administrator. That application failed. The appellant then appealed against the Land Administrator's decision to the High Court in Seremban.

In the course of argument, the learned judge took the point suo motu and held that the charge was invalid. The appellant then conceded that point. The learned judge, in our opinion, was entirely correct in the view he took the matter. His decision is amply supported by authority. In *United Malayan Banking Corporation Bhd v. Syarikat Perumahan Luas Sdn. Bhd. (No. 2)* [1988] 3 MLJ p. 352, his lordship Edgar Joseph Jr. J (as he then was) when confronted with a similar problem held the charge in that case to be void in similar circumstances. His lordship however went on to make certain orders which we will refer to later. For the present, it is sufficient to say that the judgment of Edgar Joseph Jr. J in *United Malayan Banking Corporation Bhd v. Syarikat Perumahan Luas Sdn. Bhd.* was applied and approved by the Supreme Court in *M & J Frozen Foods Sdn Bhd v. Siland Sdn Bhd* [1994] 2 CLJ 15.

Before us learned counsel for the appellant complains that the learned judge having held the charge to be void was wrong in not making – to borrow the words of s. 418 – "such order thereon as it considers just". In particular, learned counsel submitted that the learned judge ought to have made a consequential order requiring the respondent to execute a fresh charge in escrow as well as all other documents necessary to make an application to the Ruler in Council for consent to charge. In support of his submission, the learned counsel referred to the order made by Edgar Joseph Jr J in *United Malayan Banking Corporation Bhd v. Syarikat Perumahan Luas Sdn. Bhd.* In that case, his lordship having held the charge to be void, made an order that:

> … that the chargor do execute a fresh charge in terms of the charge (but with such modifications as the circumstances may require especially as regards the present outstanding sum owing) within two weeks from the date hereof, failing which, the senior assistant registrar of this court be authorized to do so. Similarly, the chargor shall do such acts or things as may be required of it under s. 108(1) Companies Act 1965, within the like period aforesaid, failing which, the senior assistant registrar to comply with the same.

It is the counsel's argument that a similar form of order should have been made here. The substance of the complaint is that the learned judge failed to address his mind to this case altogether. But we must say once in fairness to the judge that although there is no reference to the making of any ancillary orders, there is mention in his shorthand note that he has taken into consideration all relevant matters before making his order.

We have given very careful consideration to the forceful arguments presented on behalf of the appellant. This is a very sad case. A company closely related to respondent has obtained a substantial sum of money from the appellant and given through the respondent a charge that is utterly void as security for the loan. Justice demands that such practices should not be allowed to escape the net of the law. But, as it has often been said, hard cases make bad law and it is our primary duty in this court to administer justice in accordance with the law.

Now, the case of *United Malayan Banking Corporation Bhd v. Syarikat Perumahan Luas Sdn. Bhd.* is readily distinguishable. In *United Malayan Banking Corporation Bhd v. Syarikat Perumahan Luas Sdn. Bhd.* the condition requiring State Authority's consent to charge the land in that case had lapsed by the time the foreclosure application came to be heard in the High Court. Accordingly, there was no impediment to the kind of order that was made there. However, as pointed out by my learned brother Richard Malanjum JCA in the course of argument, here, the requirement of the consent of the Ruler In Council is a live condition. So, if we were to make an order in terms of that suggested by learned counsel for the appellant, such an order would be entirely infructuous if the Ruler In Council of the State of Negeri Sembilan were to reject the application to charge. As pointed out by my learned brother Richard Malanjum JCA since this court will not act in vain it would be an utterly useless exercise to make such an order. We therefore respectfully reject the argument of the appellant that the learned judge was in error in not compelling the respondent to execute a fresh charge as well as to do other acts/things necessary to obtain the consent of the Ruler In Council.

There is one other point that we need to address. This is a case in which the learned judge rightly held the charge to be void yet he made no order to remove the offending encumbrance from the face of the register. Accordingly, as the matter presently stands, the register as a mirror reflects an incorrect image. It bears on its face a charge that ought not to be there. The proper order to make in the present circumstances would be to direct the cancellation of the memorial of the charge on the register. That is the order that the learned judge ought to have made. He did not. We would make it now.

Finally, there is the question about the appellant's position in point of the remedies they have. As pointed out by Hashim Yusoff JCA in the course of argument, the appellant is not remediless. It is, as my learned brother said, entitled to obtain judgment on the covenants contained in the annexure to the charge. That document is entirely valid and constitutes a contract of loan between the parties. The respondent is obliged to respect its terms and comply with them. We have been told this morning that there is a lien holders caveat that has been entered by the appellant. It is therefore open to the appellant to obtain judgment on the covenants and take such appropriate steps as are necessary to recover the sum due to it. That is not our concern.

We are unable to see any impediment on the material facts before us in this respect. Unlike the cases of *Subchent Kaur v. Chai Sau Kian* [1958] MLJ 32 and *Overseas Union Finance Ltd v. Lim Joo Chong* [1971] 2 MLJ 124, the contract in the present case is valid and enforceable. By contrast, in the two cases just mentioned, the relevant contract was void and/or illegal so that any action on the covenant was obviously unavailable.

Our concern is whether the learned judge fell into error when he made his decision on this case. We are satisfied that he did not. The appeal is devoid of merit and must be dismissed with costs.

Before we proceed to make the appropriate order on this appeal, we would like to express our gratitude to counsel on both sides for the assistance rendered to us in this matter.

Accordingly the appeal is dismissed. There shall be no order as to costs. The deposit shall be refunded to the appellant. The orders of the High Court are affirmed save that order as to costs is hereby set aside.

The memorial of charge on the Register Document of Title to the said Land is hereby directed to be cancelled forthwith by the Land Administrator. Likewise, the memorial of charge on the Issue Document of Title to the Land is also to be cancelled. The appellant is to surrender the Issue Document of Title to the appropriate Land Administrator for cancellation of the memorial of charge. The Issue Document of Title is to be returned forthwith to the appellant after such cancellation with no loss to the lien it has over the said title. The appellant has within 1 month from today to surrender the title to the appropriate Land Administrator.